ELECTRONIC FUNDS TRANSFER AND THE BRITISH NORTH AMERICA ACT

A STUDY OF THE CONSTITUTIONAL ALLOCATION OF LEGISLATIVE POWER IN RELATION TO ELECTRONIC FUNDS TRANSFER DEVELOPMENTS IN CANADA

Working Paper #6

Professor B. Welling

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This background paper is one of a series which has been developed in connection with a research project directed by Professor Richard H. McLaren. It is directed at identifying specific issues within a designated topic. The research project was designed to identify the "Policy and Legislative Responses to Electronic Funds Transfer" from a provincial perspective.

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INTRODUCTION

This working paper deals with the development of an electronic funds transfer (EFT) system by deposit-taking institutions in Canada. It is the sixth in a series on this topic. The particular objective of this paper is to identify legal issues which will arise during the development of EFT in Canada in the near future and to analyze which legislative body, federal or provincial, has the power to deal with these issues under the British North America (BNA) Act.

EFT development, looked at as a system, brings to mind the key constitutional concepts of "banking" and "telecommunications". On the other hand, from the point of view of the individual, the prospect of EFT development raises the equally important principles of privacy and freedom of contract, or, dressed up in the finery of constitutional terminology "property and civil rights within the province."

With all constitutional problems in Canada, the proper way of categorizing a particular legal problem is a function of how the problem is looked at. More particularly, the validity of any legislation depends largely on the real purpose for which and the form in which the legislation was passed. The situation is no different with EFT.

This paper contains a potentially bewildering list of terms - EFT, STD, POS, etc. These initials are introduced as they first emerge during the analysis in Part III. In addition, a list of terms which are definitionally limited for use in this paper is contained in Part II. Part I, the basic constitutional analysis, happily proceeds without the use of or need for most of these terms.

I. CONSTITUTIONAL BACKGROUND

Federal Powers

The powers have been functionally grouped for consideration here. It must be emphasized that no such grouping occurs in the BNA Act. Thus, the constitutional analyst is free to speculate as to whether the various federal heads of power should be read conjunctively, to support a broad federal control over financial intermediation or disjunctively, to support provincial legislation controlling some aspects thereof.

1. Banking

s. 91 (15) Banking, Incorporation of Banks ...
s. 91 (16) Savings Banks

2. Money

s. 91 (18) Bills of Exchange and Promissory Notes
s. 91 (15) ...Issue of Paper Money (note that, for no apparent reason, the BNA Act sets this out in the same section as the general "Banking" power).

s. 91 (14) Currency and Coinage
s. 91 (20) Legal Tender

3. Telecommunications and Inter-Provincial Undertakings

s. 92 (10)(a) ...Telegraphs, and other Works and Undertakings connecting [provinces] or extending beyond the Limits of [a] Province.

4. General Powers

s. 91 (Preamble)...to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not

coming within the Classes of Subjects by this Act assigned exclusively to...the Provinces.
s. 91 (2) The Regulation of Trade and Commerce
s. 91 (23) Copyrights
s. 91 (27) The Criminal Law
s. 91 (6)...Statistics

5. Governmental Obligations

s. 91 (1A) The Public Debt and Property
s. 91 (4) The Borrowing of Money on the Public Credit
s. 120 (Intergovernmental payments) assumed by Canada shall, until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.
s. 91 (6) The Census

6. Particular Powers

s. 91 (21) Bankruptcy and Insolvency
s. 91 (19) Interest
s. 92 (10)(C) Such Works as, although wholly situate within (a) Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Commentary on the Federal Powers

1. Banking

The tendency of most observers has been to group the two subjects of money and banking. Thus, Laskin says:[1]

> "The BNA Act contains overwhelming internal evidence of the conviction that money, banking and credit (in its public aspect) should be exclusively of federal concern".

There is also judicial precedent for this point of view.

Considering the very sections cited here under headings 1. and 2. in 1938, Mr. Justice Hudson of the Supreme Court of Canada said:[2]

> "Read together these have a cumulative effect, I think, much greater than if individual headings were taken separately,"

The potential is strong for comprehensive federal control over the development of an electronic funds transfer system in Canada. Both authority and persuasiveness tend to suggest this at the present time. The authority is understandably scant. The technological innovations involved were neither thought of in 1867 nor were in issue before the courts which have considered the scope of the "money" and "banking" powers. Persuasiveness, in the constitutional area, has always been more a function of the political and economic realities of the times than of textbook analysis. Nevertheless, it is advisable to begin with a pessimistic view of the constitutional powers of the provinces in the development of EFT facilities.

This does not mean that the provinces are bereft of power in the field. The issue is one of paramountcy[3] until one can carve out a clear subject area beyond the reach of the Federal Parliament. To do this, one must consider as a matter of previously interpreted constitutional law, whether there are judicially defined limits on the Federal power. If no clear limits are found, the task then becomes to construct a reasonable interpretation of the enumerated federal powers which will have the effect of defining such limits without causing inconsistencies with previous decisions. Only when this has been accomplished need one consider those aspects of EFT development which may fall within provincial heads of power.

What, then, is the extent of federal power in the money and banking fields? The answer depends on whether it is jurisprudentially sound to accumulate the various heads of power into a single

subject matter ("money and banking") or whether the better approach is to separate the "banking" powers from the "money" powers. Under either approach, there are some arguments which can be advanced for the constitutional viability of provincial EFT legislation.

However, the probability of such arguments succeeding appears higher if the latter approach can be supported. This is because the powers herein listed under "money" really only deal with particular types of money. Similarly, the federal "banking" powers can be interpreted as restricted to particular types of activities, rather than the sum of activities performed presently by various deposit-taking institutions and other financial intermediaries. This will be explained throughout this working paper. The point is that if the "money" powers and the "banking" powers are notionally merged, it is more likely that all deposit taking institutions currently operating are, constitutionally, Banks within the meaning of s. 91 (15). [4]

Those who advocate a conjunctive interpretation of the "money" powers and the "banking" powers argue that banking, as set out in s. 91 (15) "is inextricably bound up with broad monetary and economic considerations." [5] The arguments proceed from an analysis of the banking function, rather than from a discussion of the meaning of money. This is because the Canadian litigation has involved the provincial incorporation of "near-banks" - financial intermediaries which perform essentially the same deposit taking and loan functions as the Federally chartered Banks. The early cases set what now seems to be an overly broad view:

> "From the outset, the courts took a broad view of the federal banking power. In Tennant v. Union Bank of Canada, [1894] A.C. 31, supra, at p. 94, the Privy Council declared that "banking" was "wide enough to embrace every transaction coming within the legitimate business of a banker"; and see also Merchants Bank v. Smith (1884), 8 S.C.R. 512. Its opinion did not vary over the years as is indicated in Reference re Alberta Bill of Rights Act, A.-G. Alta. v. A.-G. Can., [1947] A.C. 503, [1947] 4 D.L.R. 1, [1947] 2 W.W.R. 401, where it reaffirmed a consistent course of decision that what is fairly included within the conception of 'banking' is a matter reserved exclusively for Parliament, and

this without any limitation to the extent and kind of business that was carried on by banks in Canada in 1867." [6]

The link between banking and the money system can, of course, be argued from an economic point of view. However, the only question for present day constitutional law purposes is whether such a link is necessarily mandated by the British North America Act.

The principal support for such a necessary connection is derived from the Supreme Court of Canada decision in Reference Re Alberta Statutes. [7] The case dealt with three Bills by which the province of Alberta sought to set up a system of "Alberta Credit" which would functionally replace currency as the principal medium of exchange for intra-provincial commerce. A subsequent appeal to the Judicial Committee of the Privy Council [8] dealt only with the provincial taxation power. Thus, the Supreme Court of Canada pronouncements are the final word on the meaning of banking. If taken literally, the phraseology used would include within the federal banking power virtually all forms of financial intermediation over which Parliament chose to legislate.

"First, as to banking. A banker has been defined as 'a dealer in credit.' True, in ordinary speech, bank credit implies a credit which is convertible into money. But money as commonly understood is not necessarily legal tender. Any medium which by practice fulfills the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the word even although it may not be legal tender; and this statute envisages a form of credit which will ultimately, in Alberta, acquire such a degree of confidence as to be generally acceptable, in the sense that bank credit is now acceptable; and will serve as a substitute therefore... .

In substance, we repeat, this system of administration, management and circulation of credit (if, and in so far as it does not fall under the denomination 'Currency') constitutes in our view a system of 'banking' within the intendment of section 91; and the statute in our opinion is concerned with 'banking' in that sense." [9]

Looking back from 1978, one is tempted to assess this interpretation of banking as naive and simplistic. However, one

must keep in mind that the British North America Act has traditionally been interpreted in the light of the meaning of the words therein in 1867. Little progress has been made along the lines of American interpretation, which tends to view the meaning of the words of the constitution in an evolving pattern to account for the political and economic conditions of the time. As already noted, an interpretation which accords well with current economic and political reality will undoubtedly be more persuasive in the Canadian courts. Nevertheless, it is fair to say that such an interpretation must be one which the word was at least capable of bearing in 1867.

Whether or not the extreme view of a conjunctive Federal "money and banking" power is constitutionally viable, it is not a view which has yet been adopted as a legislative goal by Parliament. The history of Canadian banking regulation has been the creation of a powerful federal chartered bank system, protected against competition from other financial intermediaries.[10] In recent years, more provincially chartered institutions have increased their activities in the fields of deposit taking, cheque services and loans. Whether they are "banking" institutions and thus beyond provincial competence (and thus invalidly incorporated) appears not to be a burning legal issue. In fact, they are only carrying on the same type of business as was found not to be "banking" in Re Bergethaler Waisenamt,[11] a case which is impossible to reconcile with the broad view of the banking power drawn from the earlier cases noted supra.

There are two possible solutions: one is that the provincial institutions continue to operate by grace of Parliament, through its disinclination to "occupy the field;" the other is that the s. 91 (15) Banking power is not nearly so broad as it has heretofore been described obiter by the courts. The former point of view has been advocated elsewhere.[12] If it is correct then it is probable that Parliament can legally control nearly all aspects of EFTS simply by enacting legislation. The latter point of view is

at least arguable, and it may well be the better position. If the provinces are to legally, rather than, politically (and thus permanently, not temporarily), ensure that they have a voice in EFT development, it appears obvious that this is the position they must adopt.

From a constitutional point of view, the definition of banking is important only in order to ascertain whether a particular problem raised by the financial intermediation process can be competently handled under Federal or under provincial laws. Merely because a problem arises in a "banking" operation does not mean that a law passed in relation to the problem is necessarily a "Law ... in relation to ... Banking" under s. 91. This is the "aspect" doctrine of constitutional law. [13]

P. N. McDonald [14] has pointed out two major policy issues which arise in the field of financial intermediation -- solvency and allocation of resources within the economy. No doubt there are several other categories, but these two will suffice to show the potential constitutional breakdown of legislative power. The latter is essentially a public, interprovincial function and is being increasingly regulated by federal legislation. The solvency issue is essentially concerned with the protection of investors and, while it may have interprovincial ramifications, is largely a private, intra-provincial question and is handled as such. Except in the case of federally chartered institutions, federal legislation has not concentrated on the direct protection of investors. [15]

The existence of provincial legislation does not prevent Parliament from enacting overlapping, paramount legislation. However, it was previously noted that a history of federal disinterest and provincial regulation may make it easier to persuade the courts to adopt a narrow scope for the federal "Banking" power. This would leave substantial control over the development of EFT to the provinces. The key is the establishment of an acceptable dividing line between "Banking" and other forms of financial intermediation.

There are at least two things which the chartered banks do now from which other deposit taking financial intermediaries are excluded. Both evolve from the cheque clearing system described in Working Paper 2, The Canadian Payments System:

> "The (chartered) banks have proceeded to work out through the Canadian Bankers Association inter-bank agreements regarding the mechanics of cheque processing and clearing... The result has been that the present payments system operates by private contractual agreement and outside the statutory regime of the Bills of Exchange Act... .
>
> "The Canadian payments system is presently under the control of the Canadian chartered banks. The result is that (financial intermediaries) which are not chartered banks...are permitted to use the payments system solely by maintaining a relationship with a chartered bank."

The fact that the chartered banks operate the inter-bank clearing system is not decisive, but suggestive, that they will continue to do so. If this continues into an electronic payments system, the inter-bank clearing function will intuitively be seen constitutionally as a Banking function.

The second thing which "chartered" banks now do that other financial intermediaries do not is create money. In fairness, it is really the chartered bank system, not the individual banks, which can create money.[16] In brief, this creation of money is a side effect of the replacement of the bank note by the demand deposit as the principal constituent of the money supply.[17] In the Alberta Legislation case[18] already referred to, it was this ability to create money which was seized upon by Kerwin, J., as the distinguishing feature of the bank, at least, in its lending capacity.

> "Two debts are created; the trader who borrows, becomes indebted to the bank at a future date, and the bank becomes immediately indebted to the trader. The bank's debt is a means of payment... It is a clear addition to the amount of the means of payment in the community. The bank does not lend money."[19]

Such deposits, which are created in favour of borrowers

without increasing the reserves of the lending institution, are known as derivative deposits. McDonald asserts that:[20]

> "(O)nly those institutions whose liabilities serve as a medium of exchange create derivative deposits; if an institution's debt is not an accepted means of payment, it must be prepared to give the borrower cash."

To the extent described above many financial intermediaries create derivative deposits. However, economists point out that the creation of the money is only temporary, because the credit is used by the borrower, eventually forcing the financial intermediary to transfer its cash reserves, unless the borrower pays his money to a payee who, by chance, also deposits his money with the same intermediary. Obviously, the probability of payee re-deposit with the same intermediary is a function of its size and the degree of competition between financial intermediaries in the relevant marketplace. However, a more stabilized picture of the creation of money through derivative deposits can be seen if one focusses upon the activities of the chartered banks as a group, rather than on any particular bank or "near-bank". In Canada, all the "near-banks" carry out clearing operations through,and hold accounts with, the chartered banks.[21] Most payees will therefore, directly or indirectly, channel funds received back into the chartered banking system. In the long run then, the newly created money has an increased degree of permanence when viewed as a creation of the chartered banking system.

Financial intermediaries which are not part of this federal system are incapable of creating money, in this sense, either individually or as a group. They are prevented from doing so by the inter-bank clearing system, operated under the auspices of the Canadian Bankers Association. Clearly, the failure of Parliament to subsume all "near-banks" into the chartered banking system is, from this point of view, a simple failure to occupy the banking field. However, the longer the present system continues, the more politically difficult it is likely to become to bring all such institutions under the Bank Act.

In conclusion, it is difficult to determine just how broad the Federal banking power is. No mention has been made of s. 91 (16) (Savings Banks) and of the second part of s. 91 (15) (Incorporation of Banks). It is doubtful whether these add very much to the general head of Banking in s. 91 (15). The key point is that, if the provinces are to retain any substantial voice in the development of EFT in Canada, they must prevent the federal government from bringing all deposit taking institutions under federal control. It is clear that it is possible to effect this by political pressure. Whether it can be prevented through convincing the courts to narrowly interpret s. 91 (15) is a difficult constitutional question. It cannot be conclusively answered here.

2. Money

Money, as such, is not listed as a federal power. As pointed out supra, "money" is an economic term which varies with time. It does not ordinarily form part of our technical legal terminology. Generally, money is anything that serves as a means of payment.[22] Thus viewed, it will immediately be seen that the federal powers grouped under this category deal only with particular forms of money. In order, from general to particular, these are:

s. 91 (18) Bills of Exchange and Promissory Notes

s. 91 (15) ...Issue of Paper Money (note that, for no apparent reason, the BNA Act sets this out in the same section as the general "Banking" power).

s. 91 (14) Currency and Coinage

s. 91 (20) Legal Tender

Dealing first with the simpler heads of power, it seems probable that the obvious overlap between Currency (s. 91 (14) and Issue of Paper Money (s. 91 (15)) can be explained on the basis that

the latter was not viewed in 1867 as necessarily being an exclusive governmental function. One must recall that s. 91 merely lists subject matters in relation to which Parliament has exclusive legislative authority. Parliament has exercised this authority through the Bank of Canada Act [23] and has forbade private institutions to issue notes payable to bearer and intended to circulate as money. Only because of this legislation is Currency and Coinage (s. 91 (14)) in effect not any different from the Issue of Paper Money (s. 91 (15)). Both these powers seem rather too particular to affect the constitutional position of EFT development, except insofar as they increase the general impression that all aspects of "money and banking" are subject to Federal control. [24]

Bills of Exchange and Promissory Notes appear to be the most general forms of money listed in s. 91. Both had well-established histories prior to 1867 and it might be difficult to expand their meaning to gain legislative jurisdiction over the developing EFT field. Additionally, Federal control under this heading has been almost entirely in the area of prescribing the form and negotiability of such documents. Legislative history does not, of itself, prescribe constitutional interpretation, of course. Nonetheless, to gain control over EFT signals, both in form and content, on the ground that they perform the same function in society as did Bills of Exchange in 1867 seems somewhat far-fetched, or, at least, futuristic.

Less far-fetched, although definitely futuristic, is the possibility of some federal legislative competence under the Legal Tender (s. 91 (20)) power. No research has been done on this point and none is advised at this time. Suffice to mention that it is conceivable that EFT might some day develop to a stage where inter-account, computer linked transfers were the commonly accepted method of payment for certain classes of business, especially where large amounts of money were involved. At such a time, it might be advisable to recognize this general acceptability by defining the electronic signals as legal tender, under the then equivalent of s. 7 of the Currency and Exchange Act. [25] Whatever the effect of such

a definition on the form and content of the electronic signals might be, the possibility is too far in the future to merit further consideration here.

In conclusion, the federal "money" powers, if separated from the "banking" powers, are far too particular in nature to be of any constitutional significance in the early development of EFT.

3. Telecommunications and Inter-Provincial Undertakings

Parliament has legislative authority over works and undertakings extending beyond the boundaries of a province by way of exception to s. 92 (10). In particular, this authority extends to computer based telecommunications links by virtue of the specification of "Telegraphs" in s. 92 (10)(a).

> "No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word 'telegraph', as given by the Oxford Dictionary, is: 'An apparatus for transmitting messages at a distance, usually by signs of some kind.'" [26]

On the basis of this interpretation, the general field of "broadcasting" was found to fall within federal power. The reasoning is based on both the "telegraph" and the "extra-provincial" characteristics of broadcasting. Working strictly on the basis of stare decisis one could support the proposition that telecommunications, as a specified head of power ("Telegraphs"), is subject to a broader form of federal control than are other interprovincial operations.[27] It is assumed here that such fine distinctions need not be drawn and that the telecommunications cases actually depend upon the same reasoning as do the "inter-provincial connecting" cases. However, it must be emphasized

that the two may be subject to different constitutional considerations and that it might become necessary to sever, for jurisdictional purposes, the processing function from the transmission function in a computer based EFT operation.[28]

If the federal power over telecommunications is thus based on the inter-provincial nature of the telecommunications system, then the ambit of federal authority over EFT under this head of power is reasonably easy to define. First, the touchstone here is the computer as the basis of the system, rather than the activity, as was the case under the "Banking" power. Second:

> "(T)he scope of the federal power over (activities which would otherwise fall within provincial competence) in relation to a computer oriented information system appears to be primarily a factor of the degree to which computers evolve as an integral part of the Canadian telecommunications system," [29]

This observation should be kept in mind throughout the latter part of this paper, which visualizes the possibility of a shifting locus of constitutional power as EFT develops. Thus, federal or provincial control may be appropriate, depending on the pattern of development. An example may be helpful here. Consider the mechanization of teller functions developing into automated deposit, inter-account transfer and, perhaps, eventual electronic transfer of both information and funds. An in-house, on-line automated teller machine (ATM)[30] is easily distinguishable, and thus severable, from the external telecommunications system from which it is connected if the only reason for the connection is to assist the inter-bank clearing process. It is slightly more difficult to sever the operations of an on-line ATM located at a remote facility and shared by various institutions, through computer switched connection to the in-house system of each financial intermediary. Suppose that such a facility eventually becomes developed into both an inter-account funds transfer capability between depositors and a switched link to the inter-bank

payments system. At this stage, that part of the ATM's function which serves as a simple cash dispenser becomes virtually impossible to sever from the system as a whole. The fact is that this final scenario will not develop until the earlier stages have been gone through. During the earlier stages, provincial legislative power is easier to argue as a matter of strict constitutional law. The tendency to maintain the status quo in terms of allocation of legislative powers in existing fields of endeavour is strong in Canadian jurisprudence. As a result, eventual federal legal control over the system may not develop with the gradual integration of the machine into an integral part of the system if provincial control is established and legitimately exercised during the developmental stages.

In assessing the sytems-severability approach taken under s. 92 (10)(a), a few basic general points can be made.

(i) There has been, in the past, a judicial disinclination to split local operations away from an established system.[31]

(ii) But a local operation does not come under federal control merely because it is connected, for some purpose, to an established inter-provincial system.[32]

(iii) The distinction probably rests in the degree to which one can successfully identify a separate function which is locally self-contained, but which is connected to an inter-provincial telecommunications system for some indirectly related purpose. An obvious example would be the connection of a provincially incorporated deposit taking institution's in-house, on-line system to an inter-bank payments system solely for inter-bank clearing purposes.[33]

(iv) Even clearly identifiable local operations cannot be severed if their nature is such that they are vital to the operation as a whole. Here, some fine distinctions must be drawn between federal control over Bell Canada labour relations [34] and certification of local branch bargaining units within the chartered Bank system. [35] The key distinguishing feature may be simply that any computer link between two local accounts could be provincially controlled so long as the link could conceivably exist in essentially the same form without the external system and the system could function quite properly without the particular type of local link.

In conclusion, there would appear to be some areas of computerized financial intermediation which are not subject to federal jurisdiction under s. 92 (10)(a). It would seem that this head of power would not reach a computer based inter-account transfer system if that system developed separately from, rather than as an integral part of, a computer based inter-bank payments system. So long as the two remained separate, it appears probable that provincial control could be exercised over such things as the collection, content and dissemination of electronically stored EFT data. Possibly details regarding the form in which data was stored and transmitted would be more appropriately subject to federal control to facilitate switching to the inter-provincial system for inter-bank clearing purposes. Such a system would be similar to the current retail sales situation, in which national retailers are subject to provincial sales, advertising, and unconscionable transactions laws. The relation between customer and deposit taking institution would remain local in nature, [37] as the telecommunication aspects of the computer link would be purely incidental to the legitimate purpose of provincial control over local funds transfers.

4. General Powers

The federal power to make laws for the peace, order and good government of Canada is notorious as being a power of last resort. The topic has been exhaustively covered elsewhere.[38] For purposes of this paper, it is sufficient to dismiss the P.O.G.G. power on the following grounds.

(i) It has, apart from such dubious items of national concern as drunkenness,[39] been principally used to support federal legislation in times of war [40] or national emergency.[41]

(ii) It has been successfully invoked to cover subjects, such as aeronautics, which are not enumerated s. 91 and s. 92. However, many items invented since 1867 are not listed, yet the courts have been quite willing to fit them within enumerated heads of power by analogy. At any rate, the enumerated banking and telecommunications powers are clearly applicable to some extent to electronic funds transfer development as already outlined.

(iii) It has been used to cover existing facilities, such as the national capital (Ottawa) which are found to be of significant public concern. Computer linked funds transfers are probably only of such import inasmuch as they form an integral part of a system of interprovincial financial intermediation and information storage. Such a system is not now in place, and if it were, it would likely fall within the telecommunications power already discussed.

(iv) It might conceivably be used to support federal privacy legislation on the ground that the protection of individual privacy is a matter of fundamental civil liberties. [42] This must be considered highly unlikely and will not be entertained as a reasonable possibility herein.

The regulation of trade and commerce (s. 91 (2)) has always been limited in its application to the general regulation of a number of trades and to the flow of inter-provincial commerce.[43] Regarding the former, it is far more likely that Parliament could successfully categorize all financial intermediation as "Banking" than it could pass general regulatory laws in any detail under s. 91 (2). Similarly, the latter can be seen as merely another example of the importance of the severability of part of an inter-provincial system in assessing whether federal or provincial laws are appropriate. In addition, "trade and commerce" deals with economic regulation, and it is the other, non-economic aspects of EFT which are of importance here. The trade and commerce power is probably not capable of supporting specific enough legislation to be used to regulate EFT.

Copyrights (s. 91 (23)) and Statistics (s. 91 (6)) have not been explored in any detail for purposes of this paper. Statistics is listed in the same subsection as the census, and they may well be related. Jordan[44] expresses doubt that the statistics power could be extended to cover non-factual, evaluative or opinion data in a comprehensive enough way to exclude provincial privacy or local business practices legislation.

The Criminal Law (s. 91 (27)) is a pervasive power, and there is some authority for the proposition that anything which Parliament has chosen to punish with criminal sanctions falls within this head.[45] Such a notion must be dismissed as nonsense, for the term, as listed in the BNA Act, must have some inherent meaning. Nevertheless, there are clearly many aspects of collection, storage and dissemination of data which may be circumscribed by such criminal laws as theft and fraud. However, the obvious function of the criminal power would be to support and enforce otherwise valid Federal Banking or Telecommunications legislation. It seems unlikely that Parliament would attempt to use the criminal power in any comprehensive way to affect the development of EFT.

5. Governmental Obligations

The federal powers grouped under this heading are inherently of a public, rather than a private nature. It need only be said that Parliament is quite capable of controlling in comprehensive detail all aspects of the form and substance of the public debt, federal payments and subsidies, and the census. Historically, the existing payments system has been used to carry out these obligations. It is interesting to note that the federal government has had a catalytic effect on the development of automated deposit systems by the chartered banks.[46] With the federal government accounting for a large proportion of the GNP, this type of initiative is likely to be increased. However, such initiatives are non-legal in nature and do not properly fall within the subject matter of this paper. They are alluded to only as an indication that the federal government appears to be ready to play a leading role in the administrative development of EFT. This initiative is likely to be followed by legal development in the field, probably under the Banking power.

6. Particular Powers

Bankruptcy and Insolvency (s. 91 (21)), Interest (s. 91 (19)) and the declaratory power (s. 92 (10)(c)) are grouped here only because each of them, for separate reasons could, but will likely not assume any importance in EFT development. Each will be dealt with summarily.

"In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet one's debts or obligations, upon the occurrance of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors..."[47]

Thus, the Bankruptcy [48] and Insolvency power enables Parliament to determine to what level of financial disability one is allowed to sink before his creditors can seek apportionment of his assets. At that level, federal legislation can be enacted to deal comprehensively with all details of the debtor's finances. But so long as debtors remain solvent, s. 91 (21) has no effect. This power therefore has very little to do with the overall development of EFT. [49]

Interest (s. 91 (19)) has been narrowed from its one time definition as a general fee for the use of funds [50] to its current meaning of a charge whose amount accrues over time. [51] It is on this basis that the Ontario Unconscionable Transactions Relief Act was upheld. [52] If the limited definition is correct, then there is a large field for provincial legislation in the debt adjustment and business practices area. Both these areas loom large in the field of EFT.

The declaratory power (s. 92 (10)(c)) authorizes Parliament to summarily declare any "work" to be for the general advantage of Canada, or for two or more provinces. Such a declaration gives Parliament legislative control over the "Work" in question. The only constitutional limitation is that the power can only be used for physical objects ("Works") and not for projects ("Undertakings") in general. [53]

> "It would thus appear that Parliament might, under the declaratory power, acquire extensive jurisdiction over computer data bank systems that are physically located in a single province since computers are physical things. This, however, assumes that such action by Parliament would be politically acceptable to the people of Canada. While the declaratory power has been employed some 470 times since 1867, it has not been invoked since 1961 (see Andree Lajoie, Le Pouvoir Declaratoire du Parlement, (1959), pp. 123-151.) and it may be necessary to demonstrate an overriding national interest in computer data bank operations generally before Parliament could justify the exercise of the declaratory power. If such were the case, it is more likely that Parliament would move under the general power rather than use the declaratory power." 54

It is assumed that the current political climate, and that of the near future, would not permit extensive use of the declaratory power. Thus, though the power looms large over EFT development as a matter of strict constitutional law, a realistic approach suggests that s. 92 (10)(c) be ignored throughout this paper.

Provincial Powers

1. S. 92 (11) Property and Civil Rights in the Province

2. The Local (Intra-Provincial) Powers

   S. 92 (16) Generally all Matters of a merely local or private Nature in the Province.

   S. 92 (10) Local Works and Undertakings (excluding those listed under the federal powers)

   S. 92 (11) The Incorporation of Companies with Provincial Objects.

   S. 92 (9) Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

3. The Public Law Powers

   S. 92 (8) Municipal Institutions in the Province

   S. 92 (2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes

   S. 92 (3) The Borrowing of Money on the sole Credit of the Province.

Commentary on the Provincial Powers

General Comments

The BNA Act clearly states that the federal Parliament has legislative authority in relation to all matters not exclusively assigned to the provinces.[55] To the uninitiated, this seems to indicate that the starting point would be to ascertain whether a subject matter properly fell within the enumerated heads of s. 92. If it did, a parmountcy issue would arise if the field was occupied by competent federal legislation. If it did not, then the federal general power would apply.

That such an intuitive approach would be dead wrong is a tribute to the perversity with which the Jusicial Committee of the Privy Council interpreted the BNA Act during the first 50 years after Confederation. The traditional approach has been to ascertain whether the subject matter falls within the federal enumerated heads, usually narrowly interpreted. If the matter did not fall squarely within the federal field, all its local, private, and intra-provincial aspects were normally held to fall within the provincial domain and to be immune from federal interference.[56] Except in the cases of national emergencies, such as drunkenness, war, and economic crisis,[57] this approach has generally been followed.

The purpose of these comments is not simply to criticize what the courts have done. They are made in order to explain the approach taken in analyzing the provincial heads of power. It does not make sense to assess their scope by ignoring the traditional method of interpretation. It is assumed that any constitutional analysis of proposed legislation will follow the usual lines of identifying intra-provincial effects of the law and analyzing whether any federal head of power is sufficiently broad to support it. Therefore, the following commentaries on the provincial powers will be much briefer than have the commentaries on the federal powers. Their scope will be explained in general terms only.

1. Property and Civil Rights in the Province

Provincial power under s. 92 (13) clearly dominated the analysis of the BNA Act by the Judicial Committee of the Privy Council. The reference to property" has caused little difficulty over the years. The scope of the power to "make laws in relation to...Civil Rights in the Province" has never been defined.[58] Just what are civil rights? Laskin says:[59]

> "There is historical justification for reading s. 92 (13) as referring in part to laws governing subjects in their controversies with each other...Hence, a regulatory law, not directed to the resolution of individual controversies but rather to the control of economic activity, would not (on this view) be a law in relation to civil rights in the province, although it might fall under the other heads of s. 92... ."

It might assist the analysis to point out that the identification of the civil right of one person inherently proscribes certain activities as being civil wrongs on the part of all others. For example, a standard method of legislatively creating certain civil rights of consumers is to legislatively forbid certain activities by businessmen. The fact that some aspects of economic activity are removed from the competitive market place and subjected to public regulation does not change the character of the legislation as being in "pith and substance," in relation to civil rights.

This analysis cannot be taken too far. It is elementary that providing civil remedies for breaches of a marketing law is merely another way of causing a merchant to conform to the law. Nonetheless, the contitutional law of Canada is little else than a balancing of such competing government interests as the general regulation of marketing (federal) with the protection of individual rights (provincial). The line must be drawn somewhere, and it is often drawn on the basis of such thinly disguised argumentative techniques as private (individual) versus public (a group of individuals') rights.

Whatever the term civil rights may mean, the main difficulty is to ascertain when a law is one made "in relation to" civil rights. This difficulty is not peculiar to s. 92 (13). It occurs throughout the field of Canadian constitutional law, as any dispute readily breaks down to a consideration of which of the enumerated heads of s. 91 or s. 92 the legal problem is more clearly "in relation to." Perhaps the main provincial strength under this head flows from the method of constitutional analysis which has developed by precedent and to which reference has already been made. It is easy to point to some civil right which is being protected by almost any law. The developed constitutional technique has been to frustrate federal initiative unless some federal head of power can be affirmatively established as applicable. When legislation cannot be shown to be clearly in relation to an enumerated federal power, it is natural to fall back on s. 92 (13) so long as inter-provincial issues are not involved.

"Moreover, the territorial limitation of the words 'in the province' seem merely to limit the reach of provincial power without inviting federal regulation even in those areas where there is an inter-provincial aspect to the particular problem".[60] This means, generally, that careful drafting of a provincial statute will often result in judicial support under s. 92 (13) notwithstanding the fact that some minimal degree of extra-provincial activity is controlled[61] or inter-provincial commerce is interrupted.[62] The key is to carefully define the reach of the law and make it appear to be directed at intra-provincial activities only.

In conclusion, s. 92 (13) empowers a province to make laws to protect existing civil rights and to create new ones, with reciprocal civil obligations. This can lead to general regulation, as in the case of brewing and liquor control. Fines and other punishments can be used as coercive devices, under s. 92 (15), but the more common technique has been to enact supervisory legislation

by invoking the support of the licensing power under s. 92 (9), and by providing for civil reparation, more recently through government assisted litigation or coercion, to redress the civil wrong. Jordan summarized the potential application of the civil rights power to computer data control as follows:[63]

> "...the province many under these powers regulate directly the activities of information dealers in the province in a detailed manner, licensing the machines and persons involved and spelling out rules to govern their activities and procedures for handling information. Such laws would, of course, not have application to those operations that are found to fall to federal jurisdiction."

The limits on the federal "Banking" power will, of course, determine the degree of provincial control over the computer assisted activities of financial institutions in the province.

2. The Local (Intra-Provincial) Powers

Much of what was said under the previous heading is applicable here. Under s. 92 (16), (10), (11), and (9), the emphasis is upon the "local" aspect of a particular law. It therefore seems that the province need show no other justification for legislating regarding some installation or behaviour than to clearly establish first, that the matter is outside the federal sphere and, second, that the effects of the law will be entirely intra-provincial.

The degree to which local transactions are interwoven with the inter-provincial and international flow of commerce and information makes it increasingly difficult to visualize distinct areas of human endeavour to which these powers apply. It may be, therefore, that the main focus here in the future will relate to control over physical things and systems, whose location and functions can be easily ascertained.

This is where the degree to which a particular computer based function is integrated into a larger system becomes important. An automatic teller machine may be on-line within a province-wide financial intermediary. Whether it performs a "local" function within a province may depend upon the method by which, and the reasons why, it is switched into a common user or an inter-bank payments system. A provincial law mandating common usage in order to prevent the proliferation of remote branches would clearly be of a different constitutional character than would a federal law regulating the form and content of software in order to minimize the difficulty of integrating local funds transfers into a national clearing function. Both laws would necessarily affect the EFT function of the machine by limiting the variation of switching and programming among financial institutions, and both would affect the relationship between depositor and financial intermediary. Both would probably be valid legislation under the BNA Act.

Jordan concluded that a province could control all local businesses and operations with the following exceptions:[64]

> "(a) aeronautics, radio and television operations,
> (b) local works declared federal under s. 92 (10)(c) and
> (c) local works and undertakings that are functionally under federal jurisdiction, e.g. postal services, navigation and shipping."

Again, the question of the scope of the federal banking and telecommunications powers must be considered in attempting to assert provincial control over any aspects of computer based financial intermediation.

3. The Public Law Powers

Municipal institutions (s. 92 (8)), direct taxes within the province (s. 92 (2)), and provincial borrowing (s. 92 (3)) are more closely linked with government fiscal policy than with the

techniques of handling monetary transactions and related financial information. These powers would probably affect EFT only in that the government might be a large scale user of the system. While government initiative in the area of payroll deposits might have a catalytic effect on systems development, the provincial public law powers would appear to bear no constitutional relation to the development of EFT.

II. DEFINITION OF TERMS

It should appear obvious from the survey of federal and provincial heads of power that certain terms cannot be used haphazardly in a constitutional discussion. The ten terms set out below will be used as defined for the remainder of the working paper.

(a) Money - Any medium which, by practice, fulfills the function of money and which is commonly acceptable in payment of debts is money in the ordinary sense of the word even though it may not be legal tender.

(b) Funds - A permanent stock of money held at a person's disposal. A quantified sum of money which can be drawn upon by spending portions thereof.

(c) Currency - Whatever particular form of money is classified from time to time as sufficing for a legal tender by the Currency and Exchange Act, RSC 1970, c. 315.

(d) Bank - A federally chartered bank.

(e) Banking - Whatever form of financial intermediation which qualifies as such under the BNA Act. Because of the difficulty of determining its limits, the term is avoided in this working paper.

(f) Financial Intermediary - A general term, encompassing banks, trust companies, credit unions, insurance companies and virtually all "money" institutions.

(g) Deposit Taking Institution - Any financial intermediary which accepts deposits of money for chequing or savings purposes. It is possible, but not likely, that this term means the same as "banking" under the BNA Act. The term is used to avoid confusion with the necessarily federally controlled activities of chartered banks.

(h) Bill of Exchange - Historically developed as "an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash (currency) from place to place."

Falconbridge - Banking and Bills of Exchange (5th ed., 1935), p. 10

(i) Direct Electronic Funds Transfers, Direct Electronic Payments

A direct transfer, electronically assisted, of a specified sum of money (as defined) from one fund (as defined) ~~to~~ to another. In a direct transfer, the computer, or the financial intermediary performs both an agency function, to pass the money from buyer to seller, and an accounting function, to generate records of the transaction.

(j) Indirect Electronic Funds Transfers, Direct Electronic Payments

No direct transfer of funds between buyer and seller occurs. The financial intermediary, or the computer, performs an independent commercial function, rather than acting in an agency capacity to move portions of a buyer's funds to funds held to the seller's credit. Sellers obtain funds from a financial intermediary which has primary liability to pay the debt for the goods or services which the buyer has purchased. Buyers transfer funds to the financial

intermediary, not to the seller. Revolving credit cards are an example.

III. DEVELOPMENT OF EFT IN CANADA

This section is intended to simply outline the development of electronics as a tool in financial intermediation in Canada. A detailed account of the present system can be found in Working Papers 1 and 2. In this brief outline, the current developments have been extrapolated to preview how the system may develop in the near future. The remainder of this paper examines the legal issues raised by this pattern of development and whether federal or provincial legislative authority can be invoked at each stage under the British North America Act.

(A) Electronics Introduced as a Money-Handling Tool

Initially, electronics entered the financial intermediation business as a tool to promote efficiency in handling "money", economically defined. The method by which this was accomplished is described in Working Paper #3 as a simple mechanization of human in-house money handling functions. From a developmental point of view, this must be regarded as a false step, as no attempt was made to analyze how computer technology could be used to facilitate funds transfers throughout the system.

(B) Complete in House, On-line Transactions

Individual deposit taking institutions began to experiment with electronic servicing of customers. Although the technology for accomplishing a wide range of transactions between customer and institution appears to be available, the cash dispensing function is the most actively marketed at this time.

(C) Electronic Information Processing to Assist the Inter-Bank Clearing Process

The chartered Banks have a monopoly on the inter-bank clearing process. They have co-operated, through the Canadian Bankers Association, in developing an electronic systems approach to accounting for inter-Bank payments. This has led to standardization of the format for the clearing process, but is not tending toward direct computer connection between the Banks.

(D) Electronically Assisted Indirect Payments

These were developed in the U.S.A. and have been adopted in Canada by several of the Chartered Banks in the form of visa/chargex and master-charge. At present, these credit cards are in competition with direct cash or cheque payments as a form of funds transfer.

(E) Customer Initiated, Direct Electronic Funds Transfers

With the introduction of the Standard Turnaround Document, (see Working Paper #3) two electronic funds transfer systems will be in competition for the first time. Consumer acceptance of either the credit card or the STD will probably determine the future development of EFT as either a direct or an indirect payments system in Canada.

(F) Expansion of EFT from Isolated Transaction Handling into a System

At some stage, a full range of electronic funds transfer services may become available throughout the system of deposit taking institutions and inter-institutional clearing.

This may develop either as a federally controlled Chartered Bank monopoly or as a competitive device between deposit taking institutions supported by a separate clearing system. The choice of system may be dictated by which of direct or indirect

electronic funds transfers is more successfully marketed and upon which level of government takes the initiative in promoting and controlling the initial steps in the system's evolution.

(G) EFT Signals as Money

This is the terminal stage in EFT development. If electronic payments were to effectively replace cheques, notes and coinage as the media of exchange, the electronic signals, containing both payment order and payment itself, would properly be classified as money and could be brought under federal control through defining the signals as "currency" or "bills of exchange". It is not predicted that this stage of development will ever be reached in Canada. Consequently, this is merely presented as an interesting theoretical possibility here and will not be further analyzed.

IV. LEGAL ISSUES INVOLVED IN EFT DEVELOPMENT

The major legal issues are listed here, without much commentary. A given issue may arise at several different stages of EFT development. In Part V, three major types of payments related activities carried on by the customers of deposit-taking institutions will be set out. The stages of EFT development listed in Part III will be set out in detail as they affect these activities. Against this background, the legal issues listed here, and the constitutional authority for their resolution, which was discussed generally in Part I will be reviewed.

(A) Inter-Institutional Legal Issues

The major inter-institutional legal issue in the development of EFT is clearly whether the system should be developed in an environment of competition or regulation. Effectively, all other such issues will arise as a regulated industries problem or as an anti-combines problem. Thus, no

attempt has been made to, identify specific inter-institutional issues, except as they affect the relationship between one financial intermediary and its customers.

(B) Customer-Institutional

1. Access to the System

Use of an electronic funds transfer facility probably requires an ongoing relationship between an individual, or a business operation, and a deposit taking institution. Individuals who maintain only periodic account balances for the purpose of making electronic, rather than cash, payments would not be attractive customers. As payment by direct or indirect electric funds transfer becomes more common, currency transactions may become much more inconvenient. This creates a danger of low income individuals being excluded from the system. In the same way, low volume retailers could suffer discrimination at the hands of financial intermediaries, which would create an anti-competition problem only peripherally related to competition between, or regulation of deposit taking institutions.

At a different level, control by the chartered banks over EFT development could force provincial deposit taking institutions to decide either to seek federal charters or be precluded from competing for consumer and retailer deposits. Either alternative would appear to produce both an anti-competitive effect on society and a diminishing of provincial control.

As well as protecting those who would otherwise be excluded from the system, it might be desirable to protect the freedom of an individual to remain outside the EFT system. This cannot be done by simple enshrining of a right; it requires the assurance of the continuing availability of alternative means of covenient and economical payment.

For customers who use the EFT system, convenience of access to their funds is a key issue. This involves problems of location of system input equipment and the complexity, both in terms of use,time and re-education difficulty of operating the machinery. These are not legal issues unless the competitive or regulatory scheme set up to control EFT development fails to adequately account for them.

Two obvious problems in restructuring money transfers in society are the initial acceptability of the new method as a means of payment, which currently appears to be a marketing problem, and the question of who will pay for the more expensive means of payment during the introductory period. Currently, retail purchasers who use currency or cheques are subsidizing those who use Bank credit cards. The introduction of electronic payment methods, to supplement or replace mechanical and electronic information processing will probably require large capital investment. Some public input in the determination of cost allocation might be appropriate.

2. Security of Funds

There appear to be three general areas in which security of funds problems arise. First, theft by electronic tampering is a technical problem, from a prevention point of view, and a legal problem from a loss allocation point of view. Second, where funds are dissipated without criminal intervention, a similar loss allocation problem arises which may not be adequately covered by existing tort and restitution laws. Third, interest or charge for use rates require control. Current usury or unconscionable transactions related statutes may set limits which are inappropriately high or low for the new credit granting techniques. In the interest area, a major non-legal issue is that of consumer education as to the cost of carrying, for example, credit card balances rather than less expensive financing.

3. Control Over Funds Flow

The relationship between the individual depositor and the deposit-taking institution will no doubt continue to involve a contract of adhesion. In recognition of this, three consumer problems which arise out of the switch to electronic recording of funds transfers, and the later changeover to full electronic handling of the transfers themselves should be addressed. The first relates to the above-mentioned customer choice of payment method. If concern is felt regarding the individual's privilege of remaining outside the developing EFT system, one obvious way of protecting the individual is to preclude institutional imposition of a payment method. Whether this should be prevented by legislation or competition depends on whether a competitive or regulatory environment is imposed on deposit-taking institutions.

Meaningful transaction records are clearly required to protect the individual's control over his funds flow. What is useful to the institution for tracing purposes may not suffice for the individual's own accounting.

The right of the deposit-taking institution to effect funds transfers on its own initiative, for purposes of set-off between funds held to the credit of, and loans outstanding to, individual depositors might require revision. With the possibility of instantaneous and time delayed payments co-existing as available alternatives, the distinction between deposits, loans, and grants of provisional credit may become somewhat blurred. This would have the effect of making existing legal terminology and precedent difficult to apply.

The issue of the "float" arises in connection with control over funds flow. A float is not a legal right, but a characteristic of a particular money system. It is envisaged as a marketing device in time-delayed electronic funds transfers.

This is explained in Part V.

4. Security of Information

There are two major issues here: ensuring that information collected is accurate and the overriding problem of privacy.

To ensure accuracy, both the information on file and details regarding its dissemination might be made accessible to the individual. Additionally, some power to force the information storer to correct misinformation would be required.

The privacy issue is difficult to define. A minimal list of its component parts would include freedom from collection, ability to exclude certain details, and ability to limit dissemination of the information, both to exclude certain types of recipients and to preclude certain uses.

5. Proof of Payment

This is the subject of Working Paper #7. The three fundamental problems would appear to be adequacy of proof between customer and deposit-taking institution, the evidentiary value of records in dealing with third parties, and the adequacy of information for the depositor's tax and other business records.

6. Reversal of Payment Orders

When a previously given payment order is reversed by the depositor, some difficult questions of agency and collateral liability of the deposit-taking institution arise. The resolution of these legal issues will vary depending on whether the payment ordered was a delayed direct inter-funds transfer or an indirect funds transfer between buyer, deposit-taking institution, and seller. A further problem created by reversal of payment orders is the effect such orders have on the buyer's Sale of Goods Act remedies against an unpaid seller, as the meaning of "paid" is difficult to ascertain in such transactions

V. LEGAL CONTROL OVER ELECTRONIC ACCOUNTING FOR MONEY FLOWS

People deposit, and financial intermediaries handle, funds. People spend money. Decreasingly, the money people spend is in the form of currency. Bills of exchange have effectively replaced currency as the most common form of money. A bill of exchange is accepted in the expectation that the drawee will release funds to the payee only if the drawer has sufficient funds to his credit with the drawee. Thus, to the person who accepts a bill of exchange as money, information regarding the drawer's funds, or at least information that he has access to funds, is of significant importance.

Revolving credit cards compete with cheques as a form of money. A credit card is accepted in the expectation that the issuing financial intermediary will release funds to the payee regardless of whether the cardholder has funds. Thus, to a person who accepts a credit card as money, information regarding the cardholder's funds is of no interest. He cares only about the willingness of the card issuer to pay the bill, and this he can ascertain by a phone call.

Cheques and currency are examples of a direct funds transfer system. Revolving credit cards are an example of an indirect funds transfer system. Because of its primary liability to pay, the financial intermediary in the latter situation is likely to collect and store more information about its depositors. In analyzing the magnitude of the coming problem of legally protecting depositors' rights it may be important to correctly predict whether a direct or indirect payment system is likely to be the predominant way of spending money in the near future.

In the following analysis it is assumed that both types will continue as alternatives. With each new development of electronically assisted access to and accounting for money flows, certain of the legal issues listed in Part IV will arise. Many

of them may require legislation which anticipates, rather than compensates for legal problems created. The appropriate legislative authority under the BNA Act might vary, depending upon how the financial intermediation system as a whole develops. On the other hand, which system dominates may, in part, be determined by early steering legislation enacted by either the provinces or by Parliament. Therefore, the approach taken here is a tentative one.

The constitutional background set out in Part I, and the legal issues listed in Part IV must now be put together in some manageable form. To do this, three categories of activity carried on by deposit taking institutions have been isolated. The first deals with simple deposits and withdrawals, while the second and third deal with the two methods of automated funds transfers for payment purposes.

First, the development of automated deposits and withdrawals is addressed. This analysis is relatively straightforward and the constitutional issues fall easily into place once the legal issues between customer and deposit-taking institution are identified.

Second, the automated processing of depositor initiated direct funds transfers is analyzed. Functionally, though perhaps not legally, the deposit taking institution acts in such transactions as an agent of one depositor, the payer, carrying out his order to directly transfer a portion of his funds to the credit of another depositor, the payee. Technological developments are currently far ahead of marketing and depositor acceptability at this time. Thus, it is difficult to predict what the future development will be. Consequently, a constitutional analysis can only be advanced on a speculative basis.

Third, the automated processing of depositor initiated indirect funds transfer is analyzed. Legally, the deposit-taking institution in such transactions accepts primary liability for payment of a depositor's bills. A periodic cumulative statement of the depositor's indebtedness to the deposit-taking institution is prepared and collected. Similar periodic payments are made by the deposit taking institution to the credit of those to whom the depositor has pledged the deposit-taking institution's indebtedness. This type of EFT system is currently more highly developed, in revolving credit card form, than is the direct payment system, which is bogged down at the rather primitive cheque form. Consequently, the legal issues and the constitutional position regarding indirect funds transfers are currently somewhat clearer than with direct funds transfers. However, the constitutional position will probably become less clear if direct funds transfers are developed electronically to compete effectively with indirect funds transfers and if either the provinces or Parliament makes an early move to enact controlling legislation.

A. Automated Deposits and Withdrawals

1. Developments

To date, there have been four stages of development in this field, all of which are described in detail in Working Paper #3. Briefly, these are:

(a) in-house deposits of interest payments on guaranteed income certificates by trust companies;

(b) magnatic tape deposits of periodic federal government payments (such as Canada Savings Bonds interest);

(c) magnetic tape payroll deposits;

(d) pre-authorized debits (automated withdrawals)

(i) for in-house debts, such as mortgage or loan repayments;

(ii) for external debts, to third parties.

2. Effect on the System

In-house automated deposits of guaranteed income certificates by trust companies will probably have little effect on EFT system development. No external connection is required and, presumably, there is unlikely to be neither resistance nor particular enthusiasm on the part of depositors. At best, this is merely a step toward comprehensive in-house, on-line automated banking.

Magnetic tape deposits of periodic federal government payments are likely to have a profound effect on EFT development. The main reasons are the volume of business involved and the fact that this business is solidly in the hands of the chartered banks. This gives the chartered banks an incentive to develop an efficient inter-bank clearing process for these deposits. Moreover, as other deposit-taking institutions are excluded from participation the clearing system the chartered banks develop is likely to inhibit the eventual inclusion of non-banks. This should give the chartered banks a clear developmental edge, both in inter-bank clearing and in-house automated handling.

However, the clearing method initially developed by the Canadian Bankers Association is not electronic. Subsidiary tapes ("hard copy") are made for in-house deciphering by each participating institution. Thus, minimumization of the number of participating institutions may, paradoxically, inhibit automation of the inter-bank clearing process, for reproduction of hard copy will remain economically feasible only so long as the number of copies required is small.

This method of inter-bank clearing must be seen as only an interim development. Other government periodic payments and private payrolls will become converted to taped deposits with other deposit-taking institutions. The number of hard copies required will increase both with the number of deposit-making organizations and the number of deposit-taking institutions involved. Eventually, hard copy costs must become prohibitive and some electronic clearing method will be required. The two possible developments at this stage are independent in-house systems switched to an inter-institutional automated clearing system or a direct, on-line link between all deposit-taking institutions.

An automated clearing system, administered by the Canadian Bankers Association, appears more likely unless on-line facilities expand beyond the in-house capability for reasons unrelated to taped deposits. For example, the development of shared automatic teller machine (ATM) installations would have an inhibiting effect on the in-house, on-line system, as is explained later in this part. Therefore, the chartered banks' monopoly over the clearing system might continue if taped deposits expand faster than such devices as shared ATM facilities.

As an off-shoot of automated deposits, various deposit taking institutions are increasingly marketing accounting and other finance related services. From the point of view of EFT system development, this clearly promotes the rationalization of in-house finance and information flows, thus probably advancing the development of in-house, on line financial intermediation.

Pre-authorized debits, except for in-house debts, would appear to have reached a dead end because of customer resistance to a perceived lack of personal control over the flow of funds. The replacement, the standard-turnaround document (see Working Paper #3), belongs in the next category.

3. Legal Issues Raised

The developments in automated deposits and withdrawals point to a continued monopoly by the Canadian Bankers Association over the clearing function. This may raise both competition policy and Bank Act related problems. Constitutionally, the effect is to increase federal power over all clearing processes between deposit-taking institutions. On the other hand the alternative, external on-line connection, would have the effect of making all in-house electronic functioning appear to be part of an inter-provincial computer based "system". This, of course, could lead to the classification of all EFT functions as part of a telecommunications system under exclusive federal control. Looked at either way, the inter-institutional clearing function appears to be within the federal field, as "Banking" or "Telegraphs".

The federal government's decision to deal through the chartered banks and the provision of related financial services tied to automated deposit taking pose a problem of access to the deposit-taking field by smaller financial institutions. This raises Combines Investigation Act issues. Also, so long as provincial institutions co-exist with the chartered banks, provincial legislation to prevent forced employees' association with the financial intermediary of the employer's choice might serve indirectly to alleviate this access problem.

A more critical problem is that of individuals' access to the automated deposit system. Deposit-taking institutions may be reluctant to accept as depositors those recipients of government payments who maintain no balance in their accounts between payments. Properly worded provincial anti-discrimination legislation which would apply to all deposit taking institutions might be in order.

As with all portions of EFT development, automated deposits raise the problem of depositors' requirement for meaningful transaction records.

B. Automated Processing of Customer Initiated Direct Funds Transfers

1. Developments

Initially the chartered banks took a false step in mechanizing some of their internal functions. This has had the effect of delaying any early advantage they may have had.

Cheques have largely replaced currency as the ordinary means of spending money. However, cheques will rapidly decline in popularity because of the difficulty of avoiding the handling of paper during the clearing process (see Working Paper #2). The apparent replacement for the cheque, the standard turnaround document (STD) is on the horizon

Automated teller machines (ATM) are technologically capable of performing a wide range of financial intermediation services. However, they have principally been used as simple cash dispensers and have developed off-line, on-premises for unknown reasons. On-line, on-premises cash dispensers are now emerging. It is assumed that, once marketing difficulties due to depositor resistance and unfamiliarity are overcome, the ATM features will be developed beyond the cash dispenser stage.

On-line, off-premises cash dispensers have not yet emerged. They may do so either as shared facilities in high traffic areas or as in-house, off-premises remote units. In either form, the ATM will lead to the development of a new type of remote facility for cash dispensing, depositing, transfers between different accounts of the same depositor, and a periodic bill paying facility.

Development of the ATM as a shared remote facility has obvious aesthetic and cost advantages. Probably the impetus for this would come from legislation, rather than from co-operative initiative by deposit-taking institutions.

Acceptance of the ATM might lead to the eventual development of point of sale (POS) terminals. Their function would be to transfer funds between accounts belonging to different depositors. It is considered unlikely that this will occur because of competitive disadvantage due to customer resistance to loss of the float associated with revolving credit cards.

POS terminals may develop as a marketable credit authorization device with a limited creditability assurance function. Credit authorization provides the seller with a promise of payment by a deposit-taking institution (as does a telephone call currently in the case of revolving credit cards.) Creditability assurance provides the seller with information on the current state of the buyer's account with a deposit-taking institution. This would serve to electronically verify that buyers with accounts, but without the equivalent of a revolving credit card, had sufficient funds to pay the bill.

It is possible that POS terminals could complete direct funds transfers between accounts of retailers and consumers. However, if ATM's develop into shared remote cash dispensing facilities, if the STD is developed successfully and if revolving credit cards continue to expand, it is unlikely that a POS direct funds transfer capability will provide any marketing advantage. The only likelihood of this happening would be as a co-operative venture between a particular deposit taking institution and a large retailer which had, to that time, successfully resisted the intrusion of external revolving credit cards.

2. Effect on the System

The "mechanization" of internal functions by chartered banks has resulted in a competitive advantage by certain non-banks

in the consumer deposit area. This advantage has been exploited by the non-banks in developing extensive in-house, on-line facilities. This puts them in a good position to continue competing with the chartered banks despite their lack of direct access to the clearing system.

The main problem with the CBA controlled inter-institutional clearing process has been the volume of cheques which has overburdened it. The chartered banks must develop electronic scanning and accounting methods to minimize clearing costs. Standardization of billing processes and forms will be required. This cost-cutting function can probably be performed by the STD.

The economy to be gained will only occur if depositors can be convinced to accept the STD as a replacement for the cheque. It seems obvious that the gaining of consumer acceptability of the STD will require the co-operation of these deposit taking institutions having the consumer account lead. This may give provincial institutions a bargaining advantage in ensuring that they maintain a voice in the development of the billing and clearing process.

One feature by which the STD cuts down the costs of payment is that the STD has the effect (as do taped deposits) of creating a parallel flow of information and funds. Both go from buyer through deposit-taking institution (and perhaps the clearing process) to seller. Thus, the granting of provisional credit by the seller's deposit-taking institution is not required, as actual payment is concurrent with payment authorization.

One marketable STD feature, from the consumer's point of view, is that the buyer retains the float, but at the expense of the merchant. The "money" spent is the buyer's creditworthiness. This contrasts with revolving credit cards, where the money spent is the card issuer's promise to pay and where the float is absorbed by the issuer, of course, the seller pays for this advantage with his discount fee.

It requires little imagination to predict the next stage of development once the STD becomes common and the clearing process becomes automated. As the seller is absorbing the float costs, it should be immaterial to him whether the buyer's presentation of the STD at the buyer's deposit-taking institution results in an instantaneous funds transfer to the seller's account or accumulated payments are made to the seller by the deposit taking institution on a periodic basis. The latter seems intuitively to be to the advantage of the deposit-taking institution, as STD orders would then become merely further information to be fed into the computer to rationalize and direct periodic funds flow.

Should this occur, the STD would lose its initial character as a direct funds transfer instrument and become instead an indirect funds transfer device. At this point, the STD would operate in the same way as revolving credit cards now do, except that primary liability to pay in an STD transaction would rest with the buyer, rather than with the card issuer. Perhaps this suggests the inevitability of the predominance of indirect electronic funds transfers in the near future. With the chartered banks firmly entrenched in the revolving credit card field, the STD may be seen as becoming the poor man's (and non-chartered banks') substitute for credit cards.

The probable role of POS terminals has already been described. This leaves the question of the future role of the ATM. It has previously been pointed out that they may develop as shared facilities or as in-house, off-premises machines. In either event, it is probable that ATMs will be located in high volume traffic areas such as rail centers and airports. It is uncertain whether their development as either shared facilities or as simple remote branches would have any developmental effect on the EFT system. Sharing of ATMs would require either electronic switching between various in-house, on-line systems or integration with one on-line system among all participating deposit-taking institutions. However, the method by which the chartered banks decide to automate the inter-institutional clearing system will probably determine

whether in-house, on-line deposit taking will continue to predominate.ATM development will then simply follow the dominant trend.

3. Legal Issues Raised

Competition for consumer deposits and the expansion of financial intermediary services offered by provincial deposit-taking institutions could cause Parliament to attempt to expand the Bank Act to control their activities. Such a move would be consistent with the history of Canadian financial intermediation legislation, which has consisted of creating and protecting a strong federally chartered banking group as noted in Part I. Such a move would test the meaning of Banking in the BNA Act.

A further area for the exercise of Parliamentary control is in the inter-institutional clearing process. This is currently privately controlled by the CBA, but it seems likely that more public control will be demanded as automation increases. From the analysis in Part I, the inter-institutional clearing process would appear to be "Banking", and the electronic support system would appear to be "telecommunications" within the BNA Act. If so, the degree to which federal control could subsequently be extended to cover non-chartered banks' operations would seem to depend on the degree to which their operations were integrally connected with the clearing process. On this basis, in-house, on-line deposit taking, when carried on by non-banks, looks much less "necessarily incidental" to either the "Banking" or "telecommunications" aspects of the clearing process than does a system of inter-institutional, on-line operations.

The development of the STD raises several legal issues. On the grand scale, standardization of the form, which must be developed for efficient clearing, might call for some form of public input, perhaps in co-operation with the CBA. Such public input could be described as being required to promote consumer protection from deposit-taking institutions, likely a provincial

categorization, or as regulation of "Banking" for the purpose of promoting efficient and fair inter-institutional clearing. As with many areas of EFT development, the eventual categorization may depend upon early intervention and negotiation, rather than on careful legal drafting.

If the STD is successfully developed as a less costly clearing device, it is likely that price discrimination will be used to discourage the use of cheques. Such price discrimination, whether it developed as a concerted effort by all deposit-taking institutions, or whether it was forced upon non-banks by the chartered banks might conflict with existing provincial and federal regulatory statutes.

With the STD will develop an electronically based information processing system to assist the clearing process. Once this is in place, it may become more feasible for a seller to procure information regarding a buyer's creditworthiness. This information will be stored by deposit-taking institutions, having been collected during earlier negotiations with the depositor/buyer relating to loan applications or credit card issue. This raises the whole range of problems concerning collection, storage, and dissemination of credit information.

It has previously been pointed out that a float is merely a characteristic of a particular way of spending money and not a legal right. However, the fact that a float now exists with both cheques and credit cards suggests that some form of float might well be offered by deposit-taking institutions as a marketing device. The STD, as currently proposed, would leave provision of the float at the expense of the seller. It seems probable that the combined effect of credit card expansion and STD development will be to decrease the incidence of retail currency transactions. This will exacerbate the current problem whereby currency users are subsidizing credit card users in retail transactions. The most obvious class of consumers to use currency in such a situation is

the low income group. Some consideration, probably at the provincial level, seems called for on this point.

The future development of ATMs is difficult to predict. However, any pattern of development is likely to raise proliferation of facilities, duplication of services and Combines Investigation Act problems. Bill paying and inter-account transfers through remote, automated facilities create proof of payment or transaction difficulties under the current law. Similarly, on the broader scale, such facilities would give rise to new problems of theft, loss allocation between depositor and institution, and inter-institutional loss allocation where shared facilities were involved.

C. Automated Processing of Customer Initiated Indirect Funds Transfers

1. Developments

Revolving credit cards, the most common current form of indirect funds transfer devices, are a well established part of the money system in Canada.

POS terminals may evolve into this type of payment device, but they are not currently in use. As a result, whether they will emerge, and in what form, are both difficult to predict. If the POS terminal does appear, it seems obvious that it will develop through contractual association between one or more deposit-taking institutions and a major retail chain. This is now occurring in the U.S.A.

2. Effect on the System

No direct inter-account transfers between buyer and seller are made with revolving credit cards. The seller relies on the card issuer's promise to pay. As a result, the seller has no interest in the buyer's creditworthiness.

The card issuing institution has an obvious interest in the cardholder's creditworthiness. The issuer is therefore likely to collect and store information regarding the cardholder. The resultant store of credit information held by the card issuer becomes a valuable trade commodity, which can be used to branch out into business activities unrelated to deposit-taking.

The expansion of the credit card system creates a marketing advantage in business account soliciting by the chartered banks. Provincially chartered deposit-taking institutions have recently successfully challenged for the lead in consumer deposits. The matching of spending from consumer accounts to payments into business accounts requires a more efficient inter-institutional clearing process.

Such a clearing process may not develop by inter-institutional co-operation unless the non-banks can successfully increase their competitive ability. Without the ability to compete effectively, the non-banks are at the mercy of the chartered banks, who control both the clearing process and whatever consumer accounts are required to carry one of the two revolving credit cards currently in use. It is uncertain whether this required competitive edge can be achieved through development of the STD. However, such an edge might be achieved by an association between one of the non-banks and a large retail chain in the early development of the POS terminal.

Regardless of by whom it is developed, the POS terminal could evolve as either a buyer-seller account transfer device or a device for simplifying the three-way funds exchange (deposit-taking institution pays seller, buyer pays deposit-taking institution) inherent in the present card system. The latter approach has the marketing advantage of preserving the buyer's float.

If the seller is willing to accept periodic, rather than single-transaction associated funds transfers from the deposit-taking institution, the float will be financed by the retailer. The obvious tendency would then be for the retailer to pass this cost on to the currency using buyer.

POS terminals may be introduced through co-operation between a retailer and a chartered bank. If so, they would probably be marketed as a credit authorization device, perhaps in association with that bank's revolving credit card. If this does not occur, the POS terminal, whether used as a direct or indirect payment device, takes on the characteristics of an ATM. Indeed, there seems no reason why, given such a development, the ATM and POS terminal should co-exist.

3. Legal Issues Raised

Collecting of information is necessary in a revolving credit scheme. Creditworthiness information is marketable in a buyer-seller direct funds transfer system. The chartered banks are now in possession of a marketable commodity. This raises potential problems in connection with the Bank Act and with all the issues involved in security of information, as set out in Part IV.

The use of revolving credit cards as a means of spending money creates problems of system access to low income customers and to low volume retailers. Also, apart from the chartered banks, deposit taking institutions are inhibited from participation by the Small Loans Act and by asset distribution legislation peculiar to trust companies (see Working Paper #3). The costs of revolving credit schemes are borne by low volume retailers through higher participation fees and thus by those buyers who use cash and who buy at local, rather than centralized, shopping area. These buyers tend to be low income consumers.

A further problem created by revolving credit cards is their inefficient use by some consumers. Credit cards, which have high interest rates, appear to be used by cardholders as a source of consumer loans. This may be a consumer education problem,[65] but it clearly raises a public policy issue of inefficient resource allocation.

A further consumer education problem deals with reversal of payment orders. These are apparently available to buyers who receive defective goods. The remedy is little used by card-holders.[64] The effect of such reversals on Sale of Goods Act remedies is unknown.

Credit card transactions generate adequate tax and business records, but their evidentiary value as proof of payment is unknown.[65] Even the sufficiency for the depositor's own records purposes may come into doubt. The reporting to account holders of credit card transactions appears likely to be merged into the periodic reporting of other account transactions. Increasing automation and merging of account record keeping, will require error resolution rules flexible enough to account for further developments and comprehensive enough to prevent their avoidance through contracts of adhesion.

All these problems will be exacerbated if the POS terminal develops as an adjunct to the credit card system. The problems will, however, be different ones if POS terminals emerge as competing, rather than subsidiary devices. This point has already been set out above.

In a buyer-seller POS direct account transfers, the seller can be seen as an agent of the deposit taking institution. He thus might possibly be involved in "banking". In a credit card related POS terminal system, the "banking" issue does not arise. There, the POS terminal is performing one of two functions. It may be used as a verification of the card issuer's willingness

to accept primary responsibility to pay the bill, in the same way as the telephone is now used. This can hardly be seen as a "banking" operation. Alternatively, it may be used, through a code printed on the card, to check the current state of the buyer's account, in order to allow the seller to decide whether he wishes to extend credit. Again, no "banking" is involved and all the buyer-seller issues appear to be of a local provincial nature.

Further problems associated with the introduction of POS terminals involve accounting for human error. With a POS terminal, a new network of machine operators is added to the financial intermediary's control of funds flow. Depending on how POS terminals are developed, it may be sufficient to allow for error resolution by private arrangement between deposit-taking institution and retailer. However, the bargaining position of these two may not be equal. In addition, if the retailer is to absorb the costs of error resolution, the familiar question is raised as to which class of consumer eventually pays for electronic innovation.

From the buyer's point of view, POS terminals merely add a further stage of automation and further increase his necessity for accurate, meaningful record to allow him to control his own flow of funds. If understandable records are not produced, or if the bulk of the system's users appear incapable of handling their funds flow wisely, regulation or education programmes in co-operation with the financial intermediaries may be called for.

CONCLUSIONS

The fate of provincially incorporated deposit-taking institutions and future provincial control over local aspects of electronic funds transfers both hinge on the scope of the meaning of "banking" in the BNA Act.

The federal control over "telecommunications" is seen as a less important power in computer assisted financial intermediation. This conclusion is drawn from the assumption that lack of co-operation between deposit-taking institutions will prevent the development of inter-institutional, on-line financial intermediation. This will lead deposit-taking institutions to develop in-house, on-line facilities, with external switching to an inter-bank clearing process, operated by the chartered banks. Such a development would place the clearing process under federal control, either under the "banking" or "telecommunications" power, but should leave a large scope for provincial control over severable aspects of the depositor-institutional electronic funds transfer process.

The customer-institutional legal issues which may arise are numerous and are listed in Part IV. Similar issues arise at various stages of automation, but no attempt is made to review them here. Instead, the major technological innovations are briefly reviewed. At each stage of EFT development, the scope of provincial power over the depositor-institutional relationship can be summarized.

The important stages of technological development are:

(i) Automated taped deposits of periodic payments and automated withdrawals by pre-authorized debits.

(ii) Electronically assisted processing of "indirect" (as defined in Part II) funds transfers by the chartered banks through revolving credit cards.

(iii) In-house, on-line automatic teller machines (ATMs).

(iv) Electronic processing of inter-institutional clearing through development of the standard turnaround document (STD).

(v) Point of sale (POS) terminals.

Automated taped deposits of periodic payments and automated withdrawals by pre-authorized debits appear to be essentially of a local nature under the BNA Act concept of division of powers. Some federal issues arise if a chartered bank is a participant, if anti-competitive practices are involved, or if, the payments are essentially of an inter-provincial nature. Otherwise, neither "banking" nor "Telecommunications" seem to be the essence of the operation and provincial control over consumer protection and local business practices seems appropriate.

Electronically assisted processing of indirect funds transfers through revolving credit cards has been developed exclusively in Canada by the chartered banks. This may be sufficient to keep much of the credit card related EFT regulation under federal control, as a practical matter. On a strict constitutional law basis it is arguable that, as "banking" cannot adequately be defined as simply that which banks do, any aspect of the credit card operation which is severable from the inter-bank clearing process or the interprovincial flow of financial information can be made subject to provincial control. However, credit cards seem likely to be challenged, as a way of spending money, by other innovations in the near future. From the point of view of dividing constitutional control over the development of the entire EFT system, this may not be a major issue. At any rate, it seems clear that certain aspects of cardholders rights fall within the provincial sphere.

In-house, on-line ATMs have been slow to develop, probably because of depositor acceptance problems. This pattern of development, parallelled by the non-bank's exclusion from direct participation in the Canadian Bankers Association (CBA) run inter-bank clearing system, suggests that automated financial intermediation will continue to develop as separate in-house networks by independent deposit-taking institutions. If this pattern does continue, the scope of provincial power to legislate regarding both information and funds flow will be much greater than would be the case if ATMs developed as inter-institutional, on-line facilities. The reason is that provincial control over a

"telecommunications" network probably extends only to those portions of the interprovincial system that are functionally severable as local operations. An in-house, on-line system is easily seen as severable, as it is merely switched to an inter-institutional clearing network. The key constitutional issue is the extent to which the network can survive provincial interference with certain aspects of the severable local operation.

A new development, the STD, is to be introduced as a replacement for the cheque. This is being done to facilitate the inter-bank clearing process, which is overburdened with paper. Thus described, one can see an easy constitutional split of control over STD development. If the main purpose is to facilitate inter-bank clearing, then a standardized form is required and control over the form is seen as a necessary aspect of "banking". On the other hand, once the form is determined, there seems no reason why federal control should extend to other aspects of STD development, unless the "banking" power is much broader than it is assumed to be here. For example, one aspect of form might include the requirement for certain information to be collected for use in the clearing process. The collection of such information should thus be free from provincial interference. However, there seems no reason why a provincial law precluding dissemination of the information for purposes unrelated to the clearing process should not be valid, absent some paramount federal law to the same effect.

Few details are available regarding the STD at this time. Consequently, little can be said about them at this time, other than that cost considerations suggest that they will develop quickly.

POS terminals may not develop at all. There seems little reason why they should co-exist with a network of ATMs.

If POS terminals do develop, they probably will do so as a co-operative venture between a major retail chain and either a chartered bank or a provincially chartered deposit-taking institution.

If a chartered bank is involved, it seems likely that the POS terminal will be used somehow in conjunction with that bank's revolving credit card. Apart from Combines Investigation Act problems, the major issues, at least at the introductory stage, probably fall within provincial control.

If a provincially chartered deposit-taking institution is involved, there is a possibility of the POS terminal's being used as a direct funds transfer device. This is considered unlikely. If it is not so used, then the POS terminal would be used as a creditworthiness check or a credit authorization device, in which case the issues would be the same as in the chartered bank situation. If the POS terminal were used as a direct funds transfer device, it would be arguable that the POS terminal operator was engaged in the federal field of "banking" only if it could be successfully argued that the deposit-taking institution was involved in "banking". The latter issue is unresolved at this time and seems to depend on whether the essence of "banking" is really found at the depositor-institutional level or actually lies in the process of inter-institutional clearing.

This revives the fundamental question of the constitutional meaning of the term "banking". It seems unlikely that the meaning of this term will be resolved judicially under our present constitution.

FOOTNOTES

1. Laskin, Canadian Constitutional Law, (3rd ed. rev. 1969) p. 603.

2. Re Alberta Legislation [1938] 2 D.L.R. 81, at p. 135.

3. "Paramountcy" means that where otherwise valid provincial and federal legislation conflict, the latter must prevail. "[T]he enactments of the Parliament of Canada, insofar as these are within its competency, must override provincial legislation" (A-G. Ontario v. A-G. Canada [1896] A.C. 348 at p. 366. In a field where federal power is broad, such as criminal law, only if Parliament chooses not to "occupy the field" can provincial regulatory legislation stand (see O'Grady v. Sparling, [1960] S.C.R. 804, 25 D.L.R. (2d) 145.)

4. This point of view is urged by P. N. McDonald, The BNA Act and the Near Banks, (1972) 10 Alta. L. R. 155.

5. McDonald (note 4).

6. Laskin, p. 604.

7. [1938] S.C.R. 100, 2 D.L.R. 81.

8. A-G. Alberta v. A-G. Canada [1939] A.C. 117, [1938] 4 D.L.R. 433.

9. [1938] S.C.R. 100, 2 D.L.R. 81, per Duff, C. J.

10. McDonald, supra, note 4, p. 161.

11. [1949[1 D.L.R. 769 (Man. C.A.).

12. McDonald, supra, note 4.

13. See generally Laskin, p. 89 ff. It is the purpose of legislation, not merely its subject matter, which determines its constitutional locus of authority.

14. Supra, note 4.

15. Ibid., p. 161.

16. McDonald clearly draws this distinction pp. 175-190. His point is that other financial intermediaries are also part of the money creating process, but that they do not, as such, create money because of their need to hold deposits, for clearance purposes, with the chartered banks. He advocates rationalization of the process by federal legislation to bring all "near-banks" into the chartered bank system. He makes a strong constitutional argument [p. 186] "that all lending institutions whose liabilities serve as means of payment are engaged in the business of banking ..." . He suggests that, historically, "it was the banks' note issuing powers that in 1867 set them apart as 'banking' institutions."

17. Ibid., p. 176, citing McLeod, The Mystics of Credit Creation, (1960) 67 The Canadian Banker 20 at p. 23.

18. Supra, note 7.

19. Ibid., at p. 128.

20. McDonald, supra, note 4, at p. 187.

21. See Working Paper #2.

22. Reference Re Alberta Statutes, [1938] S.C.R. 100, [1938] 2 D.L.R. 81.

23. R.S.C. 1970 c. B-2, s. 2 (1).

24. Supra, note 1.

25. R.S.C. 1970, c. C-315.

26. Re Regulation and Control of Radio Communication, [1932] A.C. 304 (JCPC).

27. Both the form and the content of radio programming have been held to be within federal control - Re CFRB and A-G. Canada [1973] 3 O. R. 819, 38 D.L.R. (3d) (Ont. C.A.). The tendency in other areas has been to sever the local operation from the extra-provincial. Infra, footnotes 32, 33.

28. "Two views may be taken of the computer facility. Because all operations of the machine in relation to the data that it contains are performed by the facility quite independent of its connection with transmission lines, one may consider the computer as a work

separate and distinct from the communications facilities. Viewed in this way, no federal jurisdiction over the computer and its operations would arise by virtue of section 92 (10)(a) since the computer is merely a local work in a province, incidentally connected with an extra-provincial operation... . On the other hand, one may view the computer-oriented information process as a single, integrated undertaking in which the computer facility is one part of the physical system, all parts of which are employed in the storage and transmission of date." FJE Jordan, Privacy, Computer Data Banks, Communications and the Constitution - a study by the Privacy and Computer Task Force of the Federal Government, p. 52.

29. Ibid., p. 65. Jordan's point was addressed only to the protection of privacy, but it seems equally applicable to all provincial heads of power.

30. See Working Paper #3, on Banking Techniques.

31. E.g., the labour relations of Bell Canada are under federal control- Commission Du Salaire Minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767. Regulation of local cable T.V. stations is federal - Re Public Utilities Commission and Victoria Cablevision (1965), 51 D.L.R. (2d) 716 (B.C. C.A.).

32. Provincial highways, rail lines and pipelines have been held to be subject to provincial control despite such connections. The cases are summarized by Jordan, supra note 28, p. 30-31.

33. Failure to identify such a distinct local function was clearly alluded to as the reason for the non-application of provincial laws in two leading cases. In Toronto v. Bell Telephone, (1905) A.C. 52, at p. 59, the point was put thusly:

> The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business.

Similarly, in The Queen (Ont.) v. Board of Transport Commissioners, (1968), 65 D.L.R. (2d) 425:

> In the present case, the constitutional jurisdiction depends on the character of the railway line, not on the character of a particular service provided on that railway line. The fact that for some purposes the commuter service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view the commuter service trains are part of the over-all operations of the line over which they run. It is clearly established that the Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction.

34. Supra, note 31.

35. Office and Technical Employees, Local No. 15 and the Bank of Montreal, Clinton Branch (Can.) [1978] 1 Canadian L.R.B.R. 157.

36. For the details of the TCTS operations, see Jordan, supra note 28, at p. 48-50.

37. Provided, that is, that the federal "Banking" power did not expand to envelop all deposit taking institutions, as previously detailed.

38. Laskin, Canadian Constitutional Law, devotes an entire chaper to P.O.G.G.

39. Russell v. The Queen (1882), 7 App. Cas. 829.

40. Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd., [1923] A.C. 695, 3 D.L.R. 629.

41. Re Anti-Inflation Act, [1976] 2 S.C.R. 373.

42. This approach is suggested as a possibility by Jordan, supra, note 28, at p. 15-16. He cites the appropriate authorities.

43. See generally Laskin, supra note 38, ch. 7.

44. Supra, note 28, p. 11.

45. "The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?" Proprietary Articles Trade Association v. A-G. Canada, [1931] A.C. 310, 2 D.L.R. (JCPC), per Lord Atkin.

46. See Paper #3, the Canadian Banking Techniques Study.

47. A-G BC v. A-G Canada [1937] A.C. 391 (JCPC).

48. Prior to 1877, "Bankruptcy" was not a term used in Canadian Legislation, "but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the Bankruptcy law". A-G Ontario v. A-G Canada, [1894] A.C. 189 (JCPC).

49. The theoretical power in Parliament to set the definition of insolvency at so low a level of inability to repay as to sequester the majority of individuals' accounts throughout Canada has been ignored here, for obvious reasons.

50. Reference re Saskatchewan Farm Security Act, [1949] A.C. 110 (JCPC).

51. A-G Ontario v. Barfried Enterprises Ltd. [1963] S.C.R. 570, 42 D.L.R. (2d) 137 (SCC).

52. Ibid.

53. See, generally, Laskin, supra note 1, ch. 8.

54. Jordan, supra note 4, p. 25.

55. BNA Act, preamble to s. 91

56. This simplification of the process is not so grossly overdone as one might suspect. For the purposes of the working paper, it will quite suffice, as it will properly focus the discussion against the otherwise perplexing background of conflicting constitutional cases.

57. Supra, footnotes 39 - 41.

58. See O'Connor, (1940) 18 Can. Bar Rev. 331, at p. 350.

59. Supra, note 1, p. 437.

60. Ibid.

61. See, for example, R. v. Manitoba Labour Board ex. p. Invictus Ltd. (1968), 65 D.L.R. (2d) 517 Man Q.B., per Matas, J: "The applicant's extra-provincial transport of horses is incidental to what is essentially and basically an intra-provincial business." But cf. Re Tank Truck Transport Ltd. [1960] or 497, aff'd. [1963] 1 O.R. 272.

62. The provincial laws relating to licensing of extraprovincial corporations and to corporate securities regulation are examples.

63. Supra, note 28, p. 42.

64. Ibid., p. 37.

65. See the Nova Scotia "Memorandum on Electronic Payments System" of 15 August 1977, prepared for the Office of Communications Policy.

65. See Working Paper #7.